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The Scope of Mortgage Liens on Fixtures and Personal Property in New York

Cover Page Footnote

Member of the New York and Connecticut Bar

THE SCOPE OF MORTGAGE LIENS ON FIXTURES AND PERSONAL PROPERTY IN NEW YORK

MILTON R. FRIEDMAN†

OCCUPYING a twilight zone between real and personal property the area of fixtures is one which defies precise metes and bounds. The subject of fixtures involves the right to remove, or prevent the removal of, articles installed in realty. The mortgagee's question is whether he succeeds, on foreclosure of a real property mortgage, to the articles in question or may restrain their removal prior thereto on the ground that such removal would constitute waste as against the mortgage interest. The landlord's question is whether he succeeds, on expiration of the demised term, to articles installed by the tenant or whether these are subject to removal by the tenant. The articles in issue may be subject to interests in favor of conditional vendors and chattel mortgagees, who may further complicate the problem by failing to comply with the filing or recordation requirements. Such failure may shift an initial priority of right to a *bona fide* purchaser for value. Contractors, laborers and materialmen, by contributing services and materials, may obtain rights to mechanics' liens as against an owner consenting thereto, without necessarily obtaining a priority over all other parties in interest. The mixture of priorities, thus made possible, may create a "three cornered equity"—a situation where A's equities are prior to B's, B's are prior to C's, but C's are prior to A's.¹

The common law rules of fixtures have been substantially overridden by the use of present day mortgage forms, designed to cover installed property by contract, and by various statutory provisions which will be discussed herein. This paper will first discuss the common law rules and then consider the effect of the contractual and statutory provisions.

Common Law of Fixtures

The problem of fixtures is not new. To begin with, the terms themselves are confusing. "Fixture", when used in connection with mortgagors and mortgagees, heirs and executors, and vendors and vendees of realty, refers to an article that goes with the land and is irremovable. "Trade fixture", when used in connection with landlord and tenant, refers to an article which the tenant *may* remove. Respectable authorities have said that all articles attached to realty are presumably fixtures, and that the right of removal is the exception rather than the rule.² Yet against this one may place a decision in 1506³ upholding

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1. Cf. note 114, *infra*.

2. See *Potter v. Cromwell*, 40 N. Y. 287, 294 (1869); *Tift v. Horton*, 53 N. Y. 377, 382 (1873). 2 KENT, COMM. (2d ed. 1832) 343.

the right of a grantor of realty to remove the window glass on the ground that "a house is a perfect house without glass", though, to be sure, this gave way to *Herlakenden's Case*⁴ where a contrary rule was enunciated. Kent⁵ pays lip service to the doctrine of irremovability but says this rule was so worn away that removability became the rule rather than the exception. But it is to be noted that Kent was considering the *tenant's* right of removal. He later concedes that irremovability is the general characteristic of fixtures as between vendor and vendee, mortgagor and mortgagee, and heir and executor.⁶

It is stated generally that there are three classes of articles affixed to buildings,⁷ *i.e.*, first, those, like bricks in a wall,⁸ invariably part of the realty; second, those definitively chattels, of which gas ranges and refrigerators are given as the usual examples; and a third class, which may be either, depending upon the intention of the parties. The first class gives rise to few problems, and discussion thereof, except by way of dictum, is rare. The third class, and, possibly the second, represent shifting concepts. This generalization, in a rough sort of way, will reconcile many of the decisions.

In the mortgage cases, it may be stated generally, there is a growing tendency to hold as fixtures the third class—the articles whose status is subject to the intent of the parties. When, sixty or seventy years ago, new devices were introduced into buildings, the original tendency was to treat them as removable chattels. As their use became more common this trend changed and the tendency became to regard them as part of the realty.

Indicative of the shifting of the concept of fixtures is the history of the legal treatment accorded to such devices.⁹ In 1880 the Court of Appeals¹⁰ ruled that, though gas pipes were fixtures, gas fixtures thereto attached were but chattels. It was found that the fixtures were merely screwed on to the pipes impermanently and easily detachable. Other early cases held that gas fixtures were "merely a part of the furniture

3. Y. B. 21 (1506).

4. 4 Co. Rep. 62, 76 Eng. Rep. 1025 (1589). "For without glass it's no perfect house."

5. 2 KENT, COMM. (2d ed. 1832) 343.

6. *Id.* at 346.

7. See *M. P. Moller, Inc. v. Irving Trust Co.*, 59 F. (2d) 1001, 1002 (C. C. A. 2d, 1932); *Madfes v. Beverly Development Corporation*, 251 N. Y. 12, 15, 166 N. E. 787, 788 (1929). *Chasnov v. Marlane Holding Co., Inc.*, 137 Misc. 332, 334-335, 244 N. Y. Supp. 455, 459 (Mun. Ct. 1930).

8. See *Ford v. Cobb*, 20 N. Y. 344, 350-351 (1859); *Davis v. Bliss*, 187 N. Y. 77, 83, 79 N. E. 851, 853 (1907).

9. See SCHWARTZ, REAL ESTATE MANUAL (1937) 75, for a list of personal property the attorney for the purchaser of realty is advised to include in a contract of sale.

10. *McKeage v. Hanover Fire Insurance Co.*, 81 N. Y. 38 (1880).

of the room . . . a substitute for lamps and lamp holders, candle-sticks and chandeliers, formerly used to hold candles."¹¹

The earlier Massachusetts cases laid considerable stress upon intention. In *McConnell v. Blood*,¹² it was said:

"Whatever is placed in a building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes a part of the realty, though not so fastened that it cannot be removed without serious injury either to itself or to the building. On the other hand, articles which are put in merely as furniture are removable, though more or less substantially fastened to the building."

This was followed by *Hook v. Bolton*¹³ which contains clearer implications that the articles that "go with the house" would be deemed fixtures. It was there said:¹⁴

"The gas stove and the window shades, running on rollers, stand differently. It may be that certain apartment houses, or other dwelling houses designed for occupation by tenants, are constructed in some of our cities and intended to be used in such a way that the introduction of such gas stoves and window shades by the owner, to go with the house as a part of it, for use by the tenants, may hereafter be proved at a trial. See *Jennings v. Vahey*, 183 Mass. 47, 66 N. E. 598, 97 Am. St. Rep. 409. It is entirely possible that the mode of construction and use of certain kinds of houses may be such that articles of this kind will be made a part of the house for permanent retention and use in the places where they are put. If it becomes a practice to build and use houses in such a way these articles may be put in as fixtures."

New York has adopted¹⁵ the yardstick for fixtures laid down in the oft-cited decision of *Teaff v. Hewitt*,¹⁶ with its three-fold requirement: (1) actual annexation to the freehold of a chattel appurtenant thereto; (2) adaptability for use thereof in connection with the freehold; and (3) an intention of making the same a permanent accession to the freehold. Nevertheless, in the determination of removability many expressions of the Court of Appeals, similar to those of Massachusetts, indicate that, of those requirements, intent is to be underscored. These cases indicate that the object, and not the method, of attachment is controlling, and that an immovable character may be attributed to a movable object. In the mortgage cases removability is not the sole criterion.¹⁷

11. *Capehart v. Foster*, 61 Minn. 132, 63 N.W. 257 (1895); *Vaughan v. Haldeman*, 33 Pa. 522 (1859).

12. 123 Mass. 47 (1877).

13. 199 Mass. 244, 85 N. E. 175 (1908).

14. See *id.* at 247, 85 N. E. at 176 (1908).

15. *Potter v. Cromwell*, 40 N. Y. 287 (1869); see *Voorhees v. McGinnis*, 48 N. Y. 278, 282 (1872); *McRea v. Central National Bank*, 66 N. Y. 489, 496 (1876).

16. 1 Ohio St. 511 (1853).

17. *In re Walker Bin Co.*, 9 F. Supp. 367 (W. D. N. Y. 1935).

In *Potter v. Cromwell*¹⁸ it was said:

"That it was the permanent and habitual annexation, and not the manner of fastening that determined when the article annexed became a part of the realty."

The Court quoted with approval from *Winslow v. Merchants Insurance Company*¹⁹ that essential parts of a mill and adapted to and used in connection with it "'though not at the time of the conveyance or mortgage attached to the mill, are yet a part of it, and pass with it by a conveyance, mortgage or attachment'"²⁰ and continued:

"the permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached, as upon the motive and intention of the parties in attaching it. If the article is attached for temporary use, with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold he may."

Similar expressions are found in *Voorhees v. McGinnis*²¹ and *McRea v. Central National Bank*.²²

Annexation in these cases, it would seem, is regarded more as evidence of intent than as a requirement in itself. In *Snedeker v. Warring*,²³ it was said:

"Its character may depend much upon the object of its erection. Its destination, the intent of the person making the erection, after exercising a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining that intent. . . ."

Storm doors and screens designed to fit a particular building, though used only seasonably and stored otherwise, have been held fixtures as between mortgagor and mortgagee.²⁴

18. 40 N. Y. 287 (1869).

19. 4 Metc. 306 (Mass. 1842).

20. Italics supplied. Where machinery has been held to be a fixture, spare parts or movable parts used in connection therewith, not actually annexed, have been held fixtures where their removal would leave the principal parts unfit for use and where the removable parts are not capable of general use elsewhere. There are apparently no New York cases directly in point. See *Bishop v. Bishop*, 11 N. Y. 123 (1854) (hop poles removed during off season, held fixtures); *Hoyle v. Plattsburgh Montreal R.R.*, 54 N. Y. 315, 323 (1873). And see Notes (1937) 109 A. L. R. 1424, (1937) 69 L. R. A. 892, 893-894. But articles placed upon the land with the intention of annexing the same are generally not deemed fixtures until annexation. See Notes (1937) 69 L. R. A. 892, (1908) 15 L. R. A. (N. S.) 727.

21. 48 N. Y. 278, 283, 284 (1872).

22. 66 N. Y. 489, 495, 497 (1876).

23. 12 N. Y. 170 (1854).

24. See Note (1911) 30 L. R. A. (N. S.) 1189. In *Durkee v. Powell*, 75 App. Div. 176, 77 N. Y. Supp. 368 (3d Dep't 1902), roller shades were held personalty as a matter

The "intent", so discussed, is not a subjective intent but a conclusion of law to be deduced from a certain course of action. Thus, it has been said that the character of fixtures "could be neither established or taken away by the simple declarations of the proprietor, whether oral or written",²⁵ that "the mere declaration of the owner that he intends that they shall go with the house does not make them realty"²⁶ and that a mortgagor "seldom has any special intent".²⁷

Nevertheless, these expressions, treating the factor of annexation so cavalierly, must be accepted with caution. The *Snedeker* case involved a monument of substantial proportions and there is little doubt that Parker, J. did not overlook its effective attachment by gravity alone,²⁸ and the other cases cited involved machinery in factories²⁹ fastened by weight and attachments if only to steady the same against vibration. The actual holdings warrant no conclusion that unattached articles would at that time have been held fixtures. In fact, a distinction has been drawn between the machinery necessary to make a building, in general, a factory and that necessary to make it a *particular kind of factory*. Thus, equipment such as boilers, engines, elevators, shafting, sprinkler system and switch boxes have been held to be part of the realty and covered by a mortgage lien, whereas the machines used in connection therewith for operating a woodworking plant have been held to be removable chattels.³⁰

The requirement of "permanence" in installation is one not difficult to fulfill. It is satisfied, inasmuch as the articles from their nature cannot last as long as the building,³¹ if the goods are "placed there with

of law. The opinion states that the status of window and door screens as between mortgagor and mortgagee is a matter of intent but holds, upon the record before it, that the intent was that these articles be personalty.

25. See *Snedeker v. Warring*, 12 N. Y. 170, 177 (1854).

26. See *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 41 (1880).

27. See *Voorhees v. McGinnis*, 48 N. Y. 278, 286 (1872).

28. "It is said the statues and sphinxes of colossal size, which adorn the avenue leading to the temple of Karnak at Thebes, are secured on their solid foundations only by their own weight . . . if a traveller should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were still unadministered personal assets of the Ptolomies after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of [the mortgagor]. Both were erected for ornament and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means." 12 N. Y. 170, 179 (1854).

29. Factory machinery has been held a sufficient part of the realty to predicate a mechanic's lien upon its installation. *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1, 25 N. E. 1060 (1890) (gas compressor, engine, oil traps, foundation plates).

30. See *In re Walker Bin Co.*, 9 F. Supp. 367 (W. D. N. Y. 1935) and cases there collected; cf. text at p. 335-336, *supra*.

31. *Berliner v. Piqua Club Ass'n*, 32 Misc. 470, 66 N. Y. Supp. 791 (Sup. Ct. 1899), *aff'd*, 73 App. Div. 622, 76 N. Y. Supp. 671 (1st Dep't 1900).

the intention of then remaining there until worn out, or in the expression used, 'superceded' by which I take it was meant until in the progress of invention better and more suitable machinery should be produced. That thereby became a part of the permanent plant of the company, proper and necessary for it to have in order to carry on its corporate business."³²

Unique buildings and "specialties" afford additional evidence of the effect of intent in the determination of fixtures. Where a building cannot be used for designed and unique purposes without the use of certain personal property, objects therein installed and appropriate for the designed use are held to be fixtures despite a flimsy mode of annexation. Thus, seats in a theatre³³ and shelves in a library³⁴ have been held fixtures and in *Szuchs v. Toth*³⁵ the same was determined with respect to pews and a bell in a church. The mortgage in the *Szuchs* case, though recent, contained no contractual provisions covering personal property, making it clear beyond peradventure that the decision was rested upon the ground that the objects were fixtures. These cases show that, given a manifest intent that the articles remain until worn out or superceded, the mode of annexation will be accorded slight significance.

Any suggestion, however, that unattached or slightly attached articles will be held fixtures for all purposes, was arrested by the *Madfes* case,³⁶ a decision sharply emphasizing the continuing vitality of the common law rules. The *Madfes* case was a conflict, in a foreclosure action, between a mortgagee and a conditional vendor who installed gas ranges without properly filing his contract before recordation of the mortgage. The vendor prevailed, on the ground that the ranges were and remained personalty unaffected by the lien of the plaintiff's mortgage. Personal Property Law, Section 67, was held inapplicable. Had the court held, as the plaintiff strenuously argued, that the ranges were so affixed to the realty as to become a part thereof, even though severable without material injury to the freehold, Section 67 of the Personal Property Law would have impelled a decision that the plaintiff, as mortgagee, became a *bona fide* purchaser of the ranges when obtaining his mortgage. The actual holding of the *Madfes* case is that gas ranges and kindred articles

32. N. Y. Security & Trust Co. v. Saratoga Gas and Electric Light Co., 88 Hun 569, 34 N. Y. Supp. 890 (Sup. Ct. 1895), *aff'd*, 157 N. Y. 689, 51 N. E. 1092 (1898).

33. *Bender v. King*, 111 Fed. 60, *aff'd*, 116 Fed. 813 (C. C. A. 9th, 1902), *cert. denied*, 187 U. S. 643 (1902); *In re Albanese*, 44 F. (2d) 602 (N. D. N. Y. 1930) (collecting cases); *Pike v. Naylor Securities Co.*, 140 Misc. 734, 251 N. Y. Supp. 659 (Sup. Ct. 1931).

34. *Rieser v. Commeau*, 129 App. Div. 490, 114 N. Y. Supp. 154 (2d Dep't 1908), *aff'd*, 198 N. Y. 560, 92 N. E. 1100 (1910). And see Note (1913) 43 L. R. A. (n. s.) 675.

35. N. Y. L. J. Dec. 19, 1934, p. 2472, col. 3 (Sup. Ct.). *Contra* as to pews: *Diamond v. Art Contracting, Inc.*, 147 Misc. 88, 262 N. Y. Supp. 471 (Sup. Ct. 1933) (failure to establish intent).

36. *Madfes v. Beverly Development Co.*, 251 N. Y. 12, 166 N. E. 787 (1929).

do not, even after annexation, become part of the realty under the common law of fixtures and that reservation of title under an unfiled conditional sale is not void as against a *bona fide* purchaser of realty (which includes a mortgagee).

Judge Crane dissented vigorously when the *Madjes* decision was handed down. He argued that the decisions upon which the majority opinion relied were rendered when gas ranges and similar articles were belongings of tenants and "customarily carted about by the tenant from place to place", that "the mode of living did not make the cook stove the almost universal equipment of houses and apartments supplied by the landlord". He continued:³⁷

"But there comes a time when the law must keep abreast of the changes in social conditions; when we as judges must recognize the circumstances under which the business of housing is now conducted . . . today people live in apartments . . . massive affairs. . . They are equipped with modern improvements. . . The gas range or cook stove and electric light fixtures and ice boxes are now common in most every apartment. The tenants do not furnish these things; they are considered as part of the realty and are so treated by every owner and by the tenants. . . The mortgagee would be startled if all the ranges and radiators were removed by the mortgagor . . . it is only a fiction of law which considers them under certain circumstances as strictly personal property."

Judge Cardozo, who voted with the majority, has made it clear, in a published address,³⁸ that the majority of the court agreed with the dissenting opinion. A contrary conclusion, said Judge Cardozo, "has an aspect unreal and almost farcical when applied to apartment life today."³⁹ What was the court to do, however:

" . . . bearing in mind the fact that sellers of the ranges under contracts of conditional sale had made their sales in the faith that the ranges were personalty merely, and had refrained from taking measures to protect themselves by recording their bills of sale in ways that would have been appropriate if they had supposed that the ranges were annexations to the land? Well, a majority of the court believed that in view of the probable reliance by innocent parties upon a decision *which the same majority would have refused to make if the question had been a new one*, there was nothing to do except to adhere to what its predecessors had done, and let *stare decisis* control the judgment".⁴⁰

Subsequently, a lower court distinguished the *Madjes* case, and held gas ranges fixtures where the name of the apartment house was burned into them.⁴¹

37. *Id.* at 22, 166 N. E. at 790 (1929).

38. Cardozo, *The Stare Decisis of the Future* (1932) 55 N. Y. S. B. A. REP. 293.

39. *Id.* at 295.

40. *Id.* at 295, 296. Italics supplied.

41. *Prudential Insurance Company v. Sanford Real Estate Corp.*, 157 Misc. 563, 284 N. Y. Supp. 73, *aff'd*, 246 App. Div. 567, 282 N. Y. Supp. 840 (4th Dep't 1935). This

The term "fixtures" is a variable concept—variable not only with respect to time, but also with respect to the class of persons interested. As between mortgagor and mortgagee and vendor and vendee, the same rules apply.⁴² But these concepts do not of necessity prevail between life tenant and remaindermen,⁴³ heirs and personal representatives,⁴⁴ or landlord and tenant.⁴⁵ As between the latter, two separate types of fixtures are recognized.⁴⁶ When the attachment is made by a tenant for

case construes together fixtures and articles covered by a personal property clause. Its authority is, therefore, not clear.

42. *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21 (1892); *Snedeker v. Warring*, 12 N. Y. 170 (1854); *Davidson v. Westchester Gas-Light Co.*, 99 N. Y. 558 (1885); *Pfluger v. Carmichael*, 54 App. Div. 153, 66 N. Y. Supp. 417 (2d Dep't 1900).

43. EWELL, *FIXTURES* (2d ed. 1905) 264.

44. See *Potter v. Cromwell*, 40 N. Y. 287, 297 (1869); *Voorhees v. McGinnis*, 48 N. Y. 278, 284 (1872); *McRea v. Central National Bank*, 66 N. Y. 489, 495 (1876).

45. *Snedeker v. Warring*, 12 N. Y. 170, 174 (1854); *Voorhees v. McGinnis*, 48 N. Y. 278, 283 (1872); *New York Security & Trust Co. v. Saratoga Gas Co.*, 88 Hun 569, 34 N. Y. Supp. 890, *aff'd*, 157 N. Y. 689, 51 N. E. 1092 (1898).

46. The determination of fixtures as between landlord and tenant is very liberal toward the tenant. *Davidson v. Westchester Gas-Light Co.*, 99 N. Y. 558, 2 N. E. 892 (1885); *Matter of City of New York*, 192 N. Y. 295, 84 N. E. 1105 (1908). Generally, the tenant may remove trade fixtures [*Ombony v. Jones*, 19 N. Y. 234 (1859)] if this can be done without substantial injury to the freehold, but it is not essential that the fixtures themselves have a removable entity. *Matter of City of New York*, *supra*, at 302, 84 N. E. at 1107; *Cohen v. Wittemann*, 100 App. Div. 338, 91 N. Y. Supp. 493 (1st Dep't 1905). But even an express right of removal has been held not to permit injury to the freehold. *Davies v. Iroquois Gas Corp.*, 272 N. Y. 572, 4 N. E. (2d) 742 (1934). It has been held that a refrigerating system extending through a building, installed by a tenant in the wholesale poultry business, is not removable as a trade fixture. *Matter of City of New York*, 101 App. Div. 527, 92 N. Y. Supp. 8 (1st Dep't 1905), but banking fixtures, cages, mahogany booths, etc. have been held removable. *Bee Building Co. v. Daniel*, 57 F. (2d) 59 (C. C. A. 8th, 1932) and *cf.* note 49. A tenant's machinery, as well as its standard interchangeable spare parts, is normally treated as personalty. *Matter of City of New York (Whitlock Ave.)*, 278 N. Y. 276, 16 N. E. (2d) 281 (1938). For a general discussion of tenant's removable trade fixtures, see MCADAM, *LANDLORD & TENANT* (5th ed. 1934) § 203, *et seq.* Articles which would ordinarily be construed to be trade fixtures, but which have been attached to replace essential articles installed by the landlord, are not removable by the tenant despite an outstanding interest therein by third persons. See *Bartholomay Brewing Co. v. Davenport*, 158 App. Div. 47, 142 N. Y. Supp. 960 (3d Dep't 1913), and cases there collected, and *cf.* text at p. 358.

A tenant with a right of removal is held to lose the same, on the theory of implied surrender, by renewal of the lease without reservation of the right of removal. *Loughran v. Ross*, 45 N. Y. 792 (1871); *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364 (1896); *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. 499 (1900); *Precht v. Howard*, 187 N. Y. 136, 79 N. E. 847 (1907). Most states follow this rule. See Notes (1906) 1 L. R. A. (n. s.) 1192, (1909) 17 L. R. A. (n. s.) 1135, (1914) 48 L. R. A. (n. s.) 294. It is justified upon the ground that, after expiration, the landlord ought not to be compelled to permit entry of the tenant for the purpose of repossessing himself of his belongings. *Lewis v. Ocean N. & P. Co.*, 125 N. Y. 341, 26 N. E. 301 (1891). The minority rule is based upon the absurdity of the presumption that a renewal lease, silent on the question of fixtures,

purposes of trade, mere attachment is insufficient to destroy the movable character of the articles so attached.⁴⁷ The tenant is presumed, because

constitutes an "abandonment" without interruption of possession. *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362 (1910); *Second National Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. 514 (1887); *Wittenmeyer v. Board of Education*, 10 Ohio C. Ct. 119 (1895). Even where followed the rule has been criticised as technical. It has not been applied where a tenant held over without a new agreement after expiration of the term [*Lewis v. Ocean N. & P. Co.*, *supra*; *Debobes v. Burtterly*, 210 App. Div. 50, 205 N. Y. Supp. 104 (1st Dep't 1924)], or to an extension of the lease [*Clarke v. Howland*, 85 N. Y. 204 (1881); *Howe's Cave Ass'n v. Houch*, 66 Hun 205, *aff'd*, 141 N. Y. 606, 36 N. E. 740 (1894)], despite an agreement to pay a higher rent [*Crater's Wharf, Inc. v. Valvoline Oil Co.*, 204 App. Div. 840, 196 N. Y. Supp. 815 (2d Dep't 1922)].

It has not been applied to trade fixtures [*Barth v. Koch*, 203 App. Div. 62, 196 N. Y. Supp. 290 (1st Dep't 1922); *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176 (Sup. Ct. 1914)]; see *Crater's Wharf, Inc. v. Valvoline Oil Co.*, 204 App. Div. 840, 841, 196 N. Y. Supp. 815, 816 (2d Dep't 1922); *cf. Mass. Nat. Bank v. Shinn*, 18 App. Div. 276, 46 N. Y. Supp. 329 (2d Dep't 1897), *aff'd*, 163 N. Y. 360, 57 N. E. 611 (1900)], or where the new lease expressly negated any abandonment of fixtures by the tenant [*Livingston v. Sulzer*, 19 Hun 375 (N. Y. 1879)]. A tenant's right of removal has been upheld against a subsequent tenant. *Stone v. National Surgical Stores, Inc.*, 193 N. Y. Supp. 634 (Sup. Ct. 1922).

In condemnation, trade fixtures, though personalty as between the landlord and tenant, and removable by the tenant, are held realty as to the condemning party and subject to compensation as such; but this applies only to such trade fixtures as are deemed part of the realty within *Madfes v. Beverly Development Corp.*, *supra*; *Matter of City of New York (Whitlock Ave.)*, 278 N. Y. 276, 16 N. E. (2d) 281 (1938); *Matter of City of New York*, 256 N. Y. 236, 176 N. E. 377 (1931); *Matter of City of New York (Tri-borough Bridge)*, 249 App. Div. 579, 293 N. Y. Supp. 223 (1st Dep't 1937); *Matter of City of New York (Woolhiser)*, 250 App. Div. 197, 293 N. Y. Supp. 850 (2d Dep't 1937).

Where the tenant expressly agrees that "all alterations, additions and improvements" should become the property of the landlord, it would seem that such a covenant would supersede the law of fixtures. The clause has been held to add to the landlord's common law rights. *Excelsior Brewing Co. v. Smith*, 125 App. Div. 668, 110 N. Y. Supp. 8 (2d Dep't 1903), *aff'd*, 198 N. Y. 519, 92 N. E. 1084 (1910). It has been given a comprehensive meaning in the landlord's favor. *Reber v. Conway*, 203 Fed. 12 (C. C. A. 3d, 1913); *French v. Mayor*, 29 Barb. 363 (N. Y. 1859). See *In re Lexington Motors Co.*, 294 Fed. 233 (C. C. A. 2d, 1923); *Levin v. Improved Property Holding Co.*, 141 App. Div. 106, 120 N. Y. Supp. 963 (2d Dep't 1910); *Center v. Everard*, 19 Misc. 156, 43 N. Y. Supp. 416 (Sup. Ct. 1897); *Bigalke & Eckert Co. v. Knabe & Co. Mfg. Co.*, 65 Misc. 29, 119 N. Y. Supp. 1114 (Sup. Ct. 1909). Nevertheless, *McAdam, J.*, in *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176 (Sup. Ct. 1914), virtually nullified the clause by construing it to refer only to changes and additions to the freehold. This approach was followed in *Century Holding Co. v. Pathe Exchange Inc.*, 200 App. Div. 62, 192 N. Y. Supp. 383 (1st Dep't 1922); *Webber v. Franklin Brewing Co.*, 123 App. Div. 465, 108 N. Y. Supp. 251 (1st Dep't 1908), *aff'd*, 198 N. Y. 509, 92 N. E. 1106 (1910); *United Booking Offices v. Pittsburgh Life & Trust Co.*, 65 Misc. 31, 119 N. Y. Supp. 216 (Sup. Ct. 1909); and *Metro-politan Concert Co. v. Sperry*, 120 N. Y. 620, 23 N. E. 1152 (1890). Interesting, though not pertinent to this paper, are the constructions placed upon N. Y. MULTIPLE DWELLING LAW (1929) § 78 (requiring an owner to keep a multiple dwelling house "and every part thereof" in repair).

47. See *Potter v. Cromwell*, 40 N. Y. 287, 295 (1869); *Ford v. Cobb*, 20 N. Y. 344, 349 (1859); 2 KENT, COMM. (2d ed. 1832) 343.

of his temporary tenure, not to intend a permanent enhancement of the value of the land;⁴⁸ and fixtures installed by a tenant are removable which, if installed by the owner, would become subject to a mortgage lien.⁴⁹ In *Tift v. Horton*,⁵⁰ the Court of Appeals wrote:

"The general rules governing the rights of parties and chattels thus annexed to the real estate rests, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of *their* relation to an interest in the land *and not from the relation or interest in it of others which* may be opposite."⁵¹

The real property mortgage, without more, covers only realty⁵² and those fixtures which our discussion heretofore has shown to be irremovable and part of the realty. However, there is no relevant statute as to what constitutes fixtures⁵³ and one must look for an answer to the state decisions. These will be followed by the federal courts.⁵⁴ Only those involving mortgagor and mortgagee and vendor and vendee of realty are pertinent.⁵⁵ The lien of the mortgage covers not only the fixtures installed at the inception of the mortgage but those subsequently installed. After-acquired fixtures are deemed to feed the mortgage lien by accession.⁵⁶ It does not cover those articles deemed to retain their character as personalty.

48. See *Tift v. Horton*, 53 N. Y. 377, 382 (1873). This does not apply to a case where the tenant covenants, as part of the consideration of the lease, to erect improvements for the landlord and leave the same on the premises upon the expiration of the lease. *Scott v. Haverstraw Clay and Brick Co.*, 135 N. Y. 141, 31 N. E. 1102 (1892).

49. *Pres. etc. Manhattan Co. v. Mosler Safe Co.*, 252 App. Div. 863 (2d Dep't 1937) (bank vault and night depository). And see *Matter of Phillips & Ibsen, Inc.*, (unreported) (S. D. N. Y. 1937); Note (1935) 98 A. L. R. 254.

50. 53 N. Y. 377, 383 (1873). Similar expressions occur in *Matter of City of New York*, 256 N. Y. 236, 245, 247, 176 N. E. 377, 381 (1931), noted in (1931) 41 YALE L. J. 146; TYLER, FIXTURES (1877) 147.

51. Italics supplied.

52. *McKeague v. Hanover Fire Ins. Co.*, 81 N. Y. 38 (1800); *Cosgrove v. Troesch*, 62 App. Div. 123, 70 N. Y. Supp. 764 (1st Dep't 1901); *Cutler Mail Chute v. Crawford*, 167 App. Div. 246, 152 N. Y. Supp. 750 (1st Dep't 1915) (deed); *Micklas v. Pickford*, 160 Misc. 254, 289 N. Y. Supp. 1058 (Sup. Ct. 1936); *Newbrook Realty Co., Inc. v. Frigidaire Sales Corporation*, N. Y. L. J. Oct. 6, 1936 p. 1026, col. 6 (City Ct.). *In re Danville Hotel Co.*, 33 F. (2d) 162 (E. D. Ill. 1929) holds hotel carpets, specially fitted and fastened, to be fixtures as to the mortgagee.

53. *In re Walker Bin Co.*, 9 F. Supp. 367 (W. D. N. Y. 1935).

54. *Id.*

55. For a discussion of articles generally covered by a real property mortgage, see JONES, MORTGAGES (8th ed. 1928) § 530, *et seq.*

56. *Matter of Phillips & Ibsen, Inc.*, (unreported) (S. D. N. Y. 1937); *Snedcker v. Warring*, 12 N. Y. 170 (1854); *Tift v. Horton*, 53 N. Y. 377 (1873); *Hoyle v. Plattsburgh & Montreal R.R.*, 54 N. Y. 315, 323 (1873); *Grown v. Keeney Settlement Cheese Ass'n*, 59 N. Y. 242 (1874); *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21 (1892); *Gates v.*

Statutory and Contractual Provisions

Despite the growing use of personal property as the regular equipment of various types of buildings prior to 1917, the mortgage forms commonly in use until then did not, as a rule, purport to cover personal property. Until then Real Property Law, Section 254,⁵⁷ which construes mortgage clauses, referred only to "appurtenances". The 1917 amendment⁵⁸ reads into the statutory form⁵⁹ of mortgages, as a part of the description of the mortgaged premises, the phrase "together with all fixtures and articles of personal property attached to or used in connection with the premises." The use of personal property clauses in mortgages is now invariable. The commonly used provisions go further than the statutory clause by purporting to cover *after-acquired* personalty. A usual short-form clause is "Together with all fixtures and articles of personal property, now or hereafter attached to, or used, in connection with the premises" These clauses will hereinafter be referred to as the "personal property clause" (derived out of Real Property Law Section 254), or the "after-acquired personal property clause" (incorporated by agreement of the parties).

These clauses attempt, by contract, to override the common law of fixtures obtaining between mortgagor and mortgagee and create a dual-natured mortgage covering realty (including fixtures) as well as personalty. Where the rights of third persons are not involved, the hybrid mortgage is apt to be construed without regard to the distinction.⁶⁰

De La Mare, 142 N. Y. 397, 37 N. E. 121 (1894); *Curry v. Geier Construction Co.*, 225 App. Div. 498, 234 N. Y. Supp. 59 (2d Dep't 1929). These cases hold that whenever, subsequent to the making of a mortgage, articles are annexed to the mortgaged premises in such manner as to be deemed part thereof, such articles are, upon such installation, covered by the mortgage. The term "accession" is used to characterize this process and is used herein solely in this sense and in disregard of its different meanings in other branches of the law.

57. N. Y. LAWS, 1909 c. 52.

58. N. Y. LAWS, 1917 c. 682.

59. N. Y. REAL PROP. LAW (1917) § 258, sets forth abbreviated forms of instruments affecting real property. The purpose is to shorten the form of such instruments and to effect this purpose, the statute sets forth how the shorter forms recommended for use shall be construed. The use of the statutory form is merely permissive and other forms are not thereby invalidated. *Goldberg v. Norek*, 101 Misc. 371, 166 N. Y. Supp. 1023 (Sup. Ct. 1917); *Rodler v. Pacht*, 118 Misc. 331, 194 N. Y. Supp. 241 (Sup. Ct. 1922). A penalty of five dollars may be imposed for using the long form. N. Y. REAL PROP. LAW (1896) § 327.

60. In *Prudential Insurance Co. v. Sanford Real Estate Corporation*, 157 Misc. 563, 565, 284 N. Y. Supp. 73, 76, *aff'd*, 246 App. Div. 567, 282 N. Y. Supp. 840 (4th Dep't 1935), leave to appeal *denied*, 269 N. Y. 682 (1935), it was said: "Either as fixtures or personal property attached to or used in connection with the premises, the following property would seem to be covered. . . . Whether any of the various articles be considered real property or personal property, it is unimportant to decide."

The validity of the dual-natured mortgage, insofar as it purports to include chattels, is not free from question. Ordinarily, in New York, chattel mortgages must be filed, and periodically refiled, in accordance with the requirement of the Lien Law.⁶¹ A section thereof,⁶² however, expressly provides that a mortgage covering realty and personalty, executed by a corporation and securing bonds,⁶³ may be recorded as a real property mortgage and need not be filed or refiled as a chattel mortgage. It has been questioned whether a single mortgage bond brought a corporate mortgage within this section. The question has been answered in the affirmative by the lower courts⁶⁴ and the same result has tacitly been assumed, though not expressly decided, by the Court of Appeals in several cases.⁶⁵ In apparently no case has the question been raised in connection with a mortgage made by an individual and, therefore, without the purview of Lien Law, Section 231. When the question arises the same result may be reached on the ground that Real Property Law, Section 254 expressly reads into every mortgage, drawn in statutory form, a phrase including personalty "attached to or used in connection with" the premises. Under well recognized rules of statutory construction that apparently conflicting statutes are to be construed in harmony if possible⁶⁶ it may be that this section will be held applicable to real property mortgages and Lien Law, Section 230 limited to exclusively chattel mortgages. It is to be noted, however, that Real Property Law, Section 254, in its present form, refers only to personal property existing at the inception of the mortgage. *It carries no reference to subsequently acquired personalty.*

61. N. Y. LIEN LAW (1909) § 230.

62. N. Y. LIEN LAW (1909) § 231.

63. *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127 (1907).

64. *In re F. & D. Co.*, 256 Fed. 73 (C. C. A. 2d, 1919); *Matter of Downtown Athletic Club*, 18 F. Supp. 712 (S. D. N. Y. 1936). *Washington Mortgage Co. v. Forways Realty Corp.*, 235 App. Div. 642, 255 N. Y. Supp. 110 (2d Dep't 1932), *aff'd*, 260 N. Y. 595, 184 N. E. 108 (1932); *Prudential Insurance Co. v. Sanford Real Estate Corp.*, 157 Misc. 563, 284 N. Y. Supp. 73, *aff'd*, 246 App. Div. 567, 282 N. Y. Supp. 840 (4th Dep't 1935), leave to appeal *denied*, *id.* 680; *Clement v. Congress Hall*, 72 Misc. 519, 132 N. Y. Supp. 16 (Sup. Ct. 1911).

65. *Cohen v. 1165 Fulton Ave. Corp.*, 251 N. Y. 24, 166 N. E. 792 (1929); *Madfes v. Beverly Development Corp.*, 251 N. Y. 12, 166 N. E. 787 (1929); *Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932); *Shelton Holding Corp. v. 150 E. 48th St. Corp.*, 264 N. Y. 339, 191 N. E. 8 (1934); *Manufacturers Trust Co. v. Peck-Schwartz Realty Corp.*, 277 N. Y. 283, 14 N. E. (2d) 70 (1938). But *cf.* *Webster v. Fall*, 266 U. S. 507, 511 (1925) quoted by Loughran, J., dissenting in *Matter of Schinasi*, 277 N. Y. 252, 269, 14 N. E. (2d) 58, 64 (1938) to the effect that: "The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

66. 1 MCKINNEY, STAT. (1916) § 177.

An after-acquired personal property clause does not bring future property under the mortgage lien merely because it so states. It operates only as against a person liable on the mortgage, extends only to the mortgagor's (or any subsequent obligor's) equity in the personal property in question, and may be cut off by the supervention of lien or attaching creditors of the mortgagor-obligor.

Theoretically, a mortgage on future property creates no present lien, on the ground that *qui non habet, ille non dat*. It is held to be a covenant to give a mortgage in the future, creating an equitable lien upon the future property when the same comes into existence. The covenant, or equitable lien, is specifically enforceable in equity, but is subject to the usual infirmities of equitable liens, and a few more besides. In the absence of intervening equities, the future property, when acquired by the mortgagor, is deemed to feed the mortgage.⁶⁷ Equities prior to the mortgage are recognized in favor of creditors, *i.e.*, lien or attaching creditors,⁶⁸ a trustee in bankruptcy,⁶⁹ and, under the former rule, an assignee for benefit of creditors.⁷⁰

Future personal property acquired by a grantee of the mortgagor, who has not assumed the mortgage, does not, as will presently appear, feed the mortgage; but such property installed by the mortgagor between the time of the execution of the mortgage and a conveyance is so covered.⁷¹ The assumption that an after-acquired property clause creates but an affirmative covenant to give a mortgage in the future leads to

67. *McCaffrey v. Woodin*, 65 N. Y. 459 (1875); *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890); *Diana Paper Co. v. Wheeler-Green Electric Co.*, 228 App. Div. 577, 240 N. Y. Supp. 103 (4th Dep't 1930); *Rosenthal v. 269 W. 72nd St. Corp.*, 148 Misc. 854, 264 N. Y. Supp. 744 (Sup. Ct. 1933); and see *Guaranty Trust Co. v. N. Y. & Q. R.R.*, 253 N. Y. 190, 199, 170 N. E. 887, 890 (1930); *Zartman v. First National Bank*, 189 N. Y. 267, 272, 82 N. E. 127, 129 (1907). The validity of a mortgage of after-acquired property is determined by the federal courts in accordance with state law. *Thompson v. Fairbanks*, 196 U. S. 516 (1905).

68. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632 (1894); *Prudence Bonds Corp. v. 1000 Island House Co., Inc.*, 141 Misc. 39, 252 N. Y. Supp. 60 (Sup. Ct. 1930); *New York Title and Mortgage Co. v. Menreal Co.*, 242 App. Div. 711, 273 N. Y. Supp. 661 (2d Dep't 1934); and *cf. Guardian Life Ins. Co. v. Newman*, N. Y. L. J. April 28, 1933 p. 2557, col. 1; *Flatbush Savings Bank v. Warner-Quinlan Co.*, N. Y. L. J. Jan. 17, 1933 (Sup. Ct.). *Contra: Clarke-Woodward Co. v. H. L. Sanatorium*, 88 Ore. 284, 169 Pac. 796 (1918). See cases in note 69, *infra*.

69. *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127 (1907); *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 100 N. E. 805 (1912).

70. *Reynolds v. Ellis*, 103 N. Y. 115, 8 N. E. 392 (1886). Under the present rule, N. Y. DEBTOR & CREDITOR LAW (1914) § 17 does not vest the assignee with the rights of a judgment debtor who has acquired a lien by attachment or levy. *Matter of Pellegrini*, 248 App. Div. 526, 528, 290 N. Y. Supp. 774, 775 (2d Dep't 1936).

71. See *Guaranty Trust Co. v. N. Y. & Q. C. Ry.*, 253 N. Y. 190, 205, 170 N. E. 887 (1930).

the conclusion that such covenant does not run with the land and bind a grantee unless the latter has assumed the mortgage covenants.⁷² A distinction is to be observed between the type of property which comes under the mortgage lien by virtue of contract and another type which feeds the mortgage by operation of law. Property annexed to the mortgaged premises after the inception of the mortgage, in such manner as to be deemed a part of the realty, becomes subject to the mortgage lien under the doctrine of accession,⁷³ but "accession as a source of title is quite distinct from the operation of a covenant for after-acquired property."⁷⁴ Accession does not apply to personal property⁷⁵ and future personalty, therefore, comes under the mortgage lien by virtue of the after-acquired personal property clause, or not at all.

72. *Guaranty Trust Co. v. N. Y. & Q. C. Ry.*, 253 N. Y. 190, 170 N. E. 887, 892 (1930); *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890); *Newbrook Realty Co. v. Frigidaire Sales Corporation*, N. Y. L. J. Oct. 6, 1936, p. 1026, col. 6 (City Ct.); and see authorities collected in *Foley & Pogue, After-Acquired Property Under Conflicting Mortgage Indentures* (1929) 13 MINN. L. REV. 81, 84 n. 17, and *DOUGLAS & SHANKS, CASES & MATERIALS ON BUSINESS UNITS* (1931) 27n., 51n., 53n., *et seq.* A covenant to pay is not an assumption of all the mortgage covenants. *Silverstein v. Brown*, 153 App. Div. 677, 138 N. Y. Supp. 848 (1st Dep't 1912).

When a mortgagor conveys to a grantee who assumes the mortgage, the mortgagee, though a stranger to the transaction, may recover upon the assumption. Since the mortgagee was a creditor of the mortgagor, the requirement of *Lawrence v. Fox*, 20 N. Y. 268 (1859) that the third party beneficiary be a creditor of the promisee is met. Where, however, due to mesne conveyances, the grantor is not liable on the mortgage, an assumption by a grantee makes the mortgagee a beneficiary who may not, in New York, enforce the assumption agreement. *Vrooman v. Turner*, 69 N. Y. 280 (1877); and see cases collected in (1921) 12 A. L. R. 1528, 1532; (1930) 39 YALE L. J. 746; (1924) 9 CORN. L. Q. 213; 1 WILLISTON, CONTRACTS 386. *Contra: Schneider v. Ferrigno*, 110 Conn. 86, 147 Atl. 303 (1929).

73. *Guaranty Trust Co. v. N. Y. & Q. C. Ry.*, 253 N. Y. 190, 170 N. E. 887 (1930), and cases collected in note 56, *supra*.

74. *Guaranty Trust Co. v. N. Y. & Q. C. Ry.*, 253 N. Y. 190, 206, 170 N. E. 887, 893 (1930).

75. *Cf.* note 74, *supra*. Insofar as *Title Guaranty & Trust Co. v. Rosenthal*, N. Y. L. J. Feb. 3, 1938, p. 568 col. 1 (Sup. Ct.), holds that refrigerators were included in the lien of a real property mortgage by accession, it cannot, in the writer's opinion, be reconciled with prevailing authority. The cases therein relied upon deal with rolling stock on railroads. In the railroad cases an unusually liberal rule obtains in treating rolling stock as fixtures where an organic, rather than a physical, union is present. See *Guaranty Trust Co. v. N. Y. & Q. C. Ry.*, 253 N. Y. 190, 206, 170 N. E. 887, 893 (1930); *Foley & Pogue, After-Acquired Property Under Conflicting Corporate Indentures*, (1929) 13 MINN. L. REV. 82, 93; *Blair, Allocation of After-Acquired Mortgage Property*, (1927) 40 HARV. L. REV. 222, 233, n. 38. *Cf. Metropolitan Trust Co. v. Chicago*, 253 Fed. 868 (C. C. A. 7th, 1918). See *Randall v. Elwell*, 52 N. Y. 521 (1873); *Hoyle v. Plattsburgh & Montreal R.R. Co.*, 54 N. Y. 315 (1873) (rolling stock held personalty). In the *Rosenthal* case, *supra*, as well as in *Kinman v. Nyrealty Corp.*, 167 Misc. 534, 3 N. Y. S. (2d) 948 (Sup. Ct. 1938), it was held that the use of rents, which had been appropriated to a mortgagee's use by an assignment of rents or the appointment of a receiver, to pay the balance due on refrig-

Effect on Attached Articles

The personal property clause quoted above is expressly designed to cover more than "appurtenances." There is little, if any, question but that the after-acquired personal property clause covers, generally, such attached articles as are subsequently installed by the mortgagor though not of such nature as would be deemed to be a part of the realty.⁷⁶ The questions raised by attached articles come up between the mortgagee and third persons, usually conditional vendors and chattel mortgagees, a subject to be discussed *infra*. They offer relatively little difficulty between mortgagor and mortgagee. But the same is not true with respect to unattached articles.

Effect on Unattached Articles

It has been made clear recently that the after-acquired personal property clause is insufficient in itself to bring unattached articles under the mortgage lien and that, in addition thereto, there must be a separate manifestation of intent, that such articles be covered, either in the mortgage itself or collateral instruments, or by a general course of dealing between the mortgagor and mortgagee. In *Manufacturers Trust Company v. Peck-Schwartz Realty Corporation*,⁷⁷ the Court of Appeals laid down rules which will be projected into all future decisions on the subject. Before this case there was authority for the proposition that unattached articles, installed by the mortgagor subsequent to the inception of the mortgage, did not come under its lien. Though coal was held covered in one case,⁷⁸ the phrase "or used in connection therewith" had

erators, constituted a good defense to the mortgagee in an action based upon an alleged conversion of the refrigerators.

76. *Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932); *City Bank Farmers Trust Co. v. Progress Club*, 237 App. Div. 812, 260 N. Y. Supp. 990 (1st Dep't 1932), *aff'g*, N. Y. L. J. Oct. 31, 1932 p. 1346, col. 3; *New York Title & Mortgage Co. v. Menreal Corporation*, 242 App. Div. 711, 273 N. Y. Supp. 661 (2d Dep't 1934); *Rosenthal v. 269 W. 72nd Street Corporation*, 148 Misc. 854, 264 N. Y. Supp. 744 (Sup. Ct. 1933); *Grant v. Atlantic Assets, Inc.*, 163 Misc. 728, 298 N. Y. Supp. 215 (City Ct. 1937). See *Manufacturers Trust Co. v. Peck-Schwartz Realty Corporation*, 277 N. Y. 283, 286, 14 N. E. (2d) 70, 71 (1938). The clause does not cover articles intended to be, but not yet, attached. *McCloskey v. Henderson*, 231 N. Y. 130, 131 N. E. 865 (1921) (heating equipment); *Central Chandelier Co. v. Irving Trust Co.*, *supra*, (lighting fixtures). It covers the mortgagor's interest as conditional vendee. *Washington Trust Co. v. Morse Iron Works & Dry Dock Co.*, 187 N. Y. 307, 79 N. E. 1022 (1907). The term "fittings" has been held not to include furniture. *Howe Rogers Co. v. Lynn*, 71 F. (2d) 283 (C. C. A. 2d, 1934).

77. 277 N. Y. 283, 14 N. E. (2d) 70 (1938).

78. *Clinton Trust Co. v. 142-144 Joralemon Street Co.*, 145 Misc. 475, 259 N. Y. Supp. 563 (Sup. Ct. 1932).

been held to be a nullity in *Ex parte B. P. O. Elks*,⁷⁹ *City Bank Farmers Trust Co. v. Progress Club*,⁸⁰ and *New York Title & Mortgage Co. v. Menreal Corporation*,⁸¹ cases involving furniture, furnishings, and personal property found in club houses. Their present authority must now be reassessed.

*Shelton Holding Corporation v. 150 East 48th Street Corporation*⁸² is the first Court of Appeals opinion to consider the subject. There the mortgagor, under a building-loan mortgage, covenanted to erect a fully equipped apartment hotel from the proceeds of the mortgage. After erection of the building the mortgagor entered into a lease under which the tenant agreed to install the necessary equipment. After such installation the tenant executed a chattel mortgage, covering the equipment, to a third person. In an action by the real property mortgagee to cancel the chattel mortgage, judgment was rendered for the plaintiff. The short after-acquired personal property clause was held to cover "kitchenettes". Despite a ruling by the lower court that "at no time did the said chattels . . . upon their installation, or in any other manner, become an integral part of the realty", the Court of Appeals held that the clause "covers personal property which does not by affixation become part of the realty."⁸³

Two separate reasons were advanced for the *Shelton* decision though the distinction was not marked by the court. The mortgagor's agreement to erect a completely equipped hotel was held to manifest an intent to bring such equipment under the mortgage lien. In this the case foreshadows the *Peck-Schwartz* decision. In addition to this, however, the court held that the kitchenettes were necessary in effecting the purposes for which the premises were designed.

"Without kitchenette equipment, the building would not be complete for

79. 69 F. (2d) 816 (C. C. A. 2d, 1934). Although the *Elks* case holds that the club's unattached equipment was not covered by the *personal property clause* of the mortgage, curiously enough, some of the identical articles, *i.e.*, tables, butchers' benches and blocks, were held, in another case, to have sufficient organic *unity with the realty* to be subject to a mechanic's lien for their installation. *Sherwin v. B. P. O. Brooklyn Lodge No. 22*, 148 Misc. 452, 265 N. Y. Supp. 14 (Sup. Ct. 1930). Somewhat similar is *Wahle Phillips Co. v. 59th St. Madison Ave. Co.*, 153 App. Div. 17, 138 N. Y. Supp. 13 (1st Dep't 1912), *aff'd*, 214 N. Y. 684, 108 N. E. 1110 (1915), upholding a mechanic's lien for the installation of electric light ceiling lamps and chandeliers, reflectors, brackets and lanterns, gas and electric brackets—all designed specially for the premises.

80. 237 App. Div. 812, 260 N. Y. Supp. 990 (1st Dep't 1932), *aff'g*, N. Y. L. J., Oct. 31, 1932, p. 1846, col. 3.

81. 242 App. Div. 711, 273 N. Y. Supp. 661 (2d Dep't 1934). In the *Menreal* case, *supra*, the ventilating system was deemed "a part of the freehold by accession", a result which might have been reached independently of a personal property clause.

82. 264 N. Y. 339, 191 N. E. 8 (1934).

83. *Id.* at 347, 191 N. E. at 11.

the use for which it was designed, and the parties intended that a complete apartment hotel should be placed upon the leased realty, and that kitchenette equipment should be installed by the lessee."⁸⁴

In other words, *the court found an organic, if not a physical, unity between the equipment and the realty.*

Several other decisions reached similar results without much explanation. In *President, etc., Manhattan Co. v. Silrap Construction Co.*,⁸⁵ the Court of Appeals, as did the Appellate Division, affirmed without opinion, a ruling that the after-acquired personal property clause covered furniture and furnishings in a furnished apartment house. An affirmance without opinion, while approving the result, does not necessarily endorse the reasoning of the lower court.⁸⁶ Furthermore, other factors were present including the fact that representatives of the mortgagee, while in possession, had used rents in payment of installments due on the articles in question. Besides this, a claim of unfair dealing was presented. The *Silrap* case was not, therefore, a clean cut holding. *President, etc., Manhattan Co. v. Ellda Corp.*,⁸⁷ held that the short after-acquired personal property clause covers furniture, furnishings, linen, china and glassware in addition to fixtures. These cases were followed in *Matter of Downtown Athletic Club*,⁸⁸ in which another building loan mortgage was involved. The building loan agreement there provided for the retention of the final advance until all equipment had been installed free and clear of encumbrances. In a contest over the complete furnishings of a large men's club, costing \$300,000. the mortgagee prevailed over the trustees for the mortgagor's creditors. In discussing the short after-acquired personal property, Patterson, J., wrote:⁸⁹

" . . . by such a clause furnishings not physically affixed to the building are subjected to the mortgage on the realty, provided that they are used in connection with the building for the purpose for which the building was designed. In other words, the clause is given an effect corresponding to the plain sense of the words used."

The situation virtually duplicates the *Shelton* case. Making the final advance conditional upon complete installation of the equipment was a clear indication of the security the mortgagee expected. The quoted language, however, indicates a recognition of the organic unity of the

84. *Id.*

85. 265 N. Y. 588, 193 N. E. 333 (1934). The facts appear in the record on appeal.

86. *Adrico Realty Corp. v. City of New York*, 250 N. Y. 29, 164 N. E. 732 (1928); *Palmer v. Travis*, 223 N. Y. 150, 119 N. E. 437 (1918); *Marcus, Affirmance Without Opinion* (1937) 6 FORDHAM L. REV. 212.

87. 245 App. Div. 625, 283 N. Y. Supp. 827 (1st Dep't 1935).

88. 18 F. Supp. 712 (S. D. N. Y. 1936).

89. *Id.* at 715.

equipment with the realty. The decision goes further than the *Shelton* case, considering the type of equipment awarded to the mortgagee.

The *Shelton* and later cases have been explained⁹⁰ and distinguished on the ground that they involved building loan agreements providing for construction from the proceeds of the loan. This may imply the theory that the mortgagee paid, by making building loan advances, for the articles to be installed and, upon such installation, became a "purchaser" of the equipment in question. The "purchaser" theory might properly be invoked, between the mortgagee and third persons, to resolve conflicting claims to priority but has no place in the *construction* of the after-acquired personal property clause as between mortgagor and mortgagee and those claiming through them. The building loan factor should be considered only insofar as it is an indication of an agreement covering unattached equipment. It should not be used to limit a broad interpretation of the personal property clauses to this type of case and exclude therefrom purchase money mortgages, mortgages executed upon equipped buildings after construction, or equipment installed to replace, improve or merely maintain, the premises. The building loan cases are more apt to reach the courts than the others⁹¹ but it is unreasonable to suppose that the lien of the *Shelton* mortgage would have been more limited were the same mortgage made *after* completion of the building.⁹² In such event the mortgagee would, subject to possible outstanding rights in favor of conditional vendors and chattel mortgagees, be a "purchaser" within the filing requirements and it has been so held.⁹³ When the mortgage is made after the structure is complete—a time when the more conservative lending institutions are apt to come into the picture—the theory of organic unity, advanced in the *Shelton* and *Downtown Athletic Club* cases, should impel a construction that the mortgage covers a

90. Title Guarantee and Trust Co. v. Dalan Bldg. Corp., N. Y. L. J. June 8, 1936, p. 2929, col. 1 (County Ct.); Same v. 415 National Boulevard, Inc., N. Y. L. J., May 14, 1936, p. 2481, col. 1 (County Ct.); Manufacturers Trust Co. v. 462 Fulton St. Corp., N. Y. L. J. April 6, 1936, p. 1744, col. 2 (Sup. Ct.); and *cf.* Tift v. Horton, 53 N. Y. 377, 383 (1873); Peter Doelger, Inc. v. Doone Realty Co., 167 Misc. 619 (1938); Nicklas v. Pickford, 160 Misc. 254, 257, 289 N. Y. Supp. 1058 (Sup. Ct. 1937).

91. The high proportion of building loan cases does not necessarily prove that the building loan factor is prevailing. These cases appear more frequently than others because of the common phenomena of inadequate secondary financing, collapse of the enterprise, and a consequent free for all by creditors.

92. Not until completion of the building would the mortgage have been a legal investment for trustees. See Matter of Dalsimer, 160 Misc. 906, 914, 291 N. Y. Supp. 34, 37, *aff'd*, 251 App. Div. 385, 296 N. Y. Supp. 209 (1st Dep't 1937); Matter of Adriance, 145 Misc. 349, 260 N. Y. Supp. 173 (Surr. Ct. 1932); and *cf.* People v. Clarke, 252 App. Div. 122, 123, 297 N. Y. Supp. 776 (1st Dep't 1937).

93. Compare Cohen v. 1165 Fulton Ave. Corp., 251 N. Y. 24, 166 N. E. 792 (1929); but *cf.* notes 116 and 117, *infra*.

building "complete for the purpose for which it was designed." This theory could be extended, without violence to its reasoning, to imply an intention that the building be not only "complete" but that it be *maintained* for its designed use, and thus place additions and replacements within the scope of the after-acquired property clause under the mortgage lien. It would be a slight development of the *Shelton* case to hold that lobby furniture in an apartment house is covered and it would be possible to push this tendency considerably without reaching the sweeping conclusion of the *Downtown Athletic Club* case.

The *Peck-Schwartz* case brought the question again to the Court of Appeals and involved the furniture, fixtures and equipment of a hotel. The court did not inquire whether any of the unattached equipment was essential to the use of the realty but sought merely, and found lacking, an agreement of the parties, other than the short after-acquired property clause, with respect thereto. This conclusion was based upon three factors: (1) the mortgagor had applied for a building loan mortgage without referring in his application therefor to furnishings; (2) the mortgagor's agreement to furnish the mortgagee with fire insurance on the realty did not extend to the personalty; (3) the building loan advances were to be made regardless of the installation of equipment.

The court stated flatly that the after-acquired personal property clause does not, *per se*, cover movables "which are not so attached to the realty as to become fixtures." It held that personal property not in existence at the inception of the mortgage is not thereby included in the absence of an express agreement to this effect or an unequivocal demonstration "from all the facts and circumstances that the intent was to make them a part of the security for the loan." Although all the contested articles were after-acquired, as is necessarily true in the building loan cases, this express reference to future property is apt to confuse the distinction between two unrelated questions. After-acquired property clauses are good as between parties to the mortgage although the mortgagee's rights thereunder may be cut off by creditors of the mortgagor. Therefore, there is no distinction, as between the parties, between the personal property and after-acquired personal property clauses. Here, the appellant derived his title to the realty through a junior real property mortgage and claimed the equipment through a chattel mortgage and the decision, therefore, is tantamount to a construction of the personal property clause as between the original parties to the mortgage.

Before further discussion of the *Peck-Schwartz*, *Shelton*, and *Downtown Athletic Club* cases, reference should be made to *Matter of 671 Prospect Avenue Holding Corporation*,⁹⁴ decided by the Circuit Court of Appeals, Second Circuit, so shortly after the *Peck-Schwartz* case as

94. 97 F. (2d) 513 (C. C. A. 2d, 1938).

to indicate the possibility that the benefit of the latter case was unavailable to the Circuit Court. The court here affirmed a judgment against the trustee in bankruptcy of the mortgagor, holding that the mortgage covered all the equipment of a catering establishment including forks, spoons, knives and kitchenware. The background of this case involved a contract of sale of the premises, made with an individual who subsequently assigned his rights as vendee to a corporation. The contract provided that the purchaser would give a purchase money real property mortgage and, in addition, a chattel mortgage covering considerable equipment including unattached articles. The real property coverage was less broad. On appeal, the mortgagee's attorney sought to overcome the narrow language of the real property mortgage with the argument that the contract of sale contemplating a purchase money mortgage on the realty from an *individual*, could not, under sections 230 and 231 of the Lien Law, validly cover chattels. A chattel mortgage was in fact given but, due to the mortgagee's failure to file, was disregarded by the court as well as by the parties.

Matter of 671 Prospect Avenue Holding Corporation involved a mortgage expressly purporting to cover "fixtures and articles of personal property used in the operation of said premises", and contained a long clause specifically enumerating many articles all of which, with one exception, fall into two classes: (1) articles which under common law rules are fixtures between mortgagor and mortgagee; (2) *attached* articles which under the decided cases have been held to be covered by the personal property clause. The only *unattached* article specifically referred to was furniture. The court stated that "'used in connection with, the premises' includes such unattached personalty as is necessary in effecting the purposes for which the premises were designed" but its application of this principle to tableware, etc., cannot be reconciled with the controlling state decisions.

Insofar as the *Downtown Athletic Club* and the *Peck-Schwartz* cases look for the intention of the parties beyond the after-acquired personal property clause, their approaches differ. Patterson, J. ruled that unattached equipment, organically connected with the realty, is presumably covered by the after-acquired personal property clause but that this presumption may be overridden where the mortgage papers and the conduct of the parties, taken as a whole, indicate no coverage was intended. The *Peck-Schwartz* case, without distinguishing between the different types of unattached personal property, presumes that they are not covered in the absence of an affirmative showing to the contrary.

More litigation will be necessary before the questions suggested by the *Peck-Schwartz* decision can be resolved. The *Downtown Athletic Club* and *Matter of 671 Prospect Avenue Holding Corporation* cases distin-

guished the *Elks* case on the ground that the final advance in the latter case was to be made regardless of the installation of the equipment. The *671 Prospect Avenue* case involved a purchase money, not a building loan, mortgage, and this factor was, therefore, not directly relevant. The same point was made in the *Peck-Schwartz* case. It may well be that the failure to connect the final advance with the equipment represented a compromise, without being conclusive as to the ultimate intention of the parties, between the exigencies of a not over-affluent builder and moderately conservative financing. Trust companies and trustees do not finance building construction and those that do, enjoying a relatively high interest rate, may feel safe enough in releasing the final advance immediately upon completion of the lienable work. Judge Patterson also distinguished the *Elks* case on the ground that the prospectus, under which participating interests in the mortgage were sold to the public, described only the land and building as security; and in the *Peck-Schwartz* case reference was made to the mortgagor's failure to mention furnishings in the mortgage application. In view of the existing case law too much stress should not be placed upon a reluctance to accompany a public offering of mortgage bonds with a broader statement. A mortgagor's agreement to cover equipment with fire insurance for the mortgagee's benefit is cogent evidence of an aim to bring such equipment under the mortgage but a failure so to provide does not establish the contrary. A mortgagee's fire insurance can safely be, and usually is, less than the amount of the mortgage. It rarely exceeds the value of the building exclusive of foundations. All of these arguments are admittedly speculative and are offered only to suggest that these factors should not be deemed conclusive.

The *Peck-Schwartz* rule, requiring collateral instruments to be examined, is in accord with the rule that related contracts should be read together.⁹⁵ But where a mortgage contains a personal property clause and the papers as a whole contain other provisions respecting personal property for the mortgagee's protection, shall the various provisions be deemed dependent? An agreement to give a chattel mortgage could be regarded as an intention not to rely on the real property mortgage for this purpose. In both *Downtown Athletic Club* and *671 Prospect Avenue* it was regarded merely as a covenant for further assurances. In *671 Prospect Avenue* a chattel mortgage was given which was admittedly invalid. If this chattel mortgage had not been given, would the mortgagee have had an equitable lien, based on the covenant to give a mortgage,

95. *Ewing v. Wightman*, 167 N. Y. 107, 60 N. E. 322 (1901); *Manufacturer's Trust Co. v. Steinhardt*, 265 N. Y. 145, 191 N. E. 867 (1934); and see cases in Editorial N. Y. L. J. Dec. 28, 1936, n. 5.

better than the worthless chattel mortgage actually given and subject only to rights of the mortgagor's creditors?

The law was in confusion prior to the *Peck-Schwartz* case, as is indicated by the cases cited in footnote 90, and particularly by *Title Guarantee & Trust Co. v. 415 National Boulevard Inc.*⁹⁶ wherein a foreclosure receiver applied for leave to compromise the owner of the equity's claim of conversion, based upon the receiver's use of beds, chairs, lamps, rugs, etc. The court refused to pass upon the merits of the claim and denied the application upon the condition that the mortgagee agree to hold the receiver harmless. Since the *Peck-Schwartz* case the tendency has been to refer the cases to trial.⁹⁷ These cases must necessarily look *ex post facto* into old closings for the type of evidence now required by the Court of Appeals. The newer closings will give a heavy advantage to specialists over general practitioners.

The *Peck-Schwartz* decision has encouraged mortgagee's attorneys to revise the personal property clauses, usually by expansion. To the words "articles of personal property used in connection with the premises", they have tacked on "all of which are deemed to be fixtures and a part of the realty." Calling a vestibule chair "realty" is, it is submitted, a legal solecism. Another phrase added to the after-acquired personal property clause is "all of which shall be deemed to be a portion of the security for the indebtedness." This phrase does not ring true when applied to property not in existence and installed at the mortgagor's option for replacements or mere maintenance. Another practice is to add to the short clause an encyclopedic schedule of equipment which is printed as the mortgagee's standard form of mortgage and used indiscriminately. This may show the mortgagee's habitual intent but is apt to fit a particular situation like a hired tuxedo. Furthermore, it tends to break down the policy behind the short-form mortgage connected with expanded explanations incorporated in the Real Property Law.

Many of the problems suggested by the *Peck-Schwartz* case would be avoided if the short after-acquired personal property clause "were given an effect corresponding to the plain sense of the words used." It would include the articles, irrespective of annexation, that the owner of the particular type of building involved ordinarily installs and offers for the use of prospective tenants, to make the building usable for the purposes

96. N. Y. L. J. May 14, 1936, p. 2481, col. 6. But in *Peter Doelger, Inc. v. Doone Realty Co., Inc.*, 167 Misc. 619, (Sup. Ct. 1938), an owner's claim, on settlement of a receiver's accounting, for the value of gas ranges and refrigerators not sold in the foreclosure action, or for the value of their use, was disallowed.

97. *Clinton Trust Co. v. The Church Extens. Comm.*, 255 App. Div. 155, 5 N. Y. S. (2d) 290 (App. Div. 1st Dep't 1938); and see dissent in *East River Savings Bank v. 671 Prospect Ave. Holding Corp.*, 254 App. Div. 845 (1st Dep't 1938). But cf. *Title Guarantee & Trust Co. v. Spur Amusement Corp.*, 254 App. Div. 907 (2d Dep't 1938).

for which it was designed, and exclude the articles which such tenants ordinarily install for their own purposes, despite the fact that the latter types of articles may, in fact, be occasionally supplied by an owner. A contrary rule unsatisfactorily requires an ascertainment of the intention of the *original* parties to the mortgage from data probably to be found outside of the four corners of the mortgage.⁹⁸ There should be no necessity for this because construction of a contract by acts of the parties is recognized only where the contract is ambiguous, but never to contradict its plain purport.⁹⁹ No public policy is involved,¹⁰⁰ in construing the personal property clause according to its plain sense, as has been held to be in the cases concerning a mortgagor's executory agreement to waive his right of redemption.¹⁰¹ The test applied to unattached articles would be that of organic unity. The result should go far toward satisfying the necessities that produced the development of personal property clauses, *i.e.*, that mortgage liens should cover more than common law fixtures, and clarify the rules at least with respect to the ordinary mortgage. Its application to a men's club or any unusual situation will offer difficulties and it is to these that the rule of the *Peck-Schwartz* case should be applied, and limited.

*Conditional Vendors' Rights—Personal Property Law,
Sections 65 and 67*

The rights of conditional vendors are affected by the necessity of filing under one of two statutes. Personal Property Law, Section 65, applying to chattels generally, makes the reservation of title void as against a creditor or lienor who purchases the goods or acquires a lien without notice before the conditional sale is filed. Personal Property Law, Section 67, applies to chattels intended to be affixed to realty and contains, in substance, the three following provisions:

(1) If the chattels are not severable¹⁰² without material injury, the reserva-

98. This factor does not make for ready assignability of mortgages—a matter of importance to owners in the refinancing of mortgages which do not generally run for more than five years.

99. *Buder v. New York Trust Co.*, 82 F. (2d) 168 (C. C. A. 2d, 1936); *Elefante v. Pizitz*, 182 App. Div. 819, 169 N. Y. Supp. 910 (1st Dep't 1918), *aff'd*, 230 N. Y. 567, 130 N. E. 896 (1920).

100. "Stipulations between a landlord and tenant . . . are not matters of public concern." *Kirshenbaum v. General Outdoor Advertising Co.*, 258 N. Y. 489, 495, 180 N. E. 245, 247 (1932). And leasehold provisions excusing a lessor from liability for his own negligence were upheld (*id.*) until N. Y. REAL PROP. LAW (1937) § 234 expressly made them invalid in leases thereafter executed.

101. *Prudential Ins. Co. v. Liberdar Holding Co.*, 74 F. (2d) 50, 53 (C. C. A. 2d, 1934); and see dissent in *Verity v. Metropolis Land Co.*, 248 App. Div. 748, 288 N. Y. Supp. 625 (2d Dep't 1936), *aff'd*, 274 N. Y. 624, 10 N. E. (2d) 582 (1937).

102. For constructions of "severability" see (1935) 48 HARV. L. REV. 857; (1927) 36 YALE L. J. 713.

tion of title is void, after affixation, as against an owner of the realty not assenting to the reservation;

(2) If the goods are so affixed to the realty "as to become part thereof" but severable without material injury, the reservation of title is void as against subsequent purchasers for value of the realty without notice of the reservation, unless the conditional sale is filed;

(3) As against the owner of realty, who is not the buyer of goods, the reservation of title is void where the chattels are removable unless the conditional sale is filed before the goods are affixed.¹⁰³

In general these sections make the difficulty of removal the criterion of the rights of the conditional vendor who has failed to comply with the filing laws,¹⁰⁴ whereas the test of fixtures, as to the mortgagee, is, as has been already noted, largely one of intent.¹⁰⁵

The second part of this section:

"changed the law as to the legal status of certain classes of chattels so affixed to real property as to become a part thereof, but severable therefrom without material injury to the freehold, and overrode the intention of the parties, theretofore controlling at common law, that such goods should remain personal property because the parties had so agreed."¹⁰⁶

This change affects only articles which are subject to conditional sales. The reservation of title by the conditional sale contract was no longer to impress the continuing character of personal property upon articles annexed to a building by a purchaser in such a manner as would otherwise be deemed to become part of the realty.¹⁰⁷ A double purpose was intended—protection for both the vendor of the goods and for a purchaser of the realty.¹⁰⁸ The statute provides for filing in the office where land titles are recorded and where the intending purchaser of realty can learn whether he may confidently buy the fixture as part of the realty. The statute, as construed, however, does not offer complete assurance to the uninitiate for the reason that the courts recognize a distinct class of goods, which though "affixed to the realty" are held to have a fixed status as personalty. This class is made up of the second group referred

103. The words "who is not the buyer of the goods" were added by N. Y. LAWS OF 1930 c. 874. Prior thereto it was read into the statute by implication. *M. P. Moller, Inc. v. Irving Trust Co.*, 59 F. (2d) 1001 (C. C. A. 2d, 1932).

104. *Matter of Phillips & Ibsen, Inc.* (unreported) (S. D. N. Y. 1937).

105. *Cf.* text at p. 333, *supra*.

106. See *In re Albanese*, 44 F. (2d) 602, 603 (N. D. N. Y. 1930).

107. See *Madfes v. Beverly Construction Co.*, 251 N. Y. 12, 16, 166 N. E. 783, 785 (1929).

108. See *Kohler Company v. Brasun*, 249 N. Y. 224, 227, 164 N. E. 31, 32 (1928).

to *supra*,¹⁰⁹ of which gas ranges and refrigerators¹¹⁰ are the most common examples. They are deemed not to become a part of the realty. They are subject to the filing and other requirements of Personal Property Law, Section 65, rather than Section 67. For this reason, a search of the land records will give no notice of the reservation of title.

Without regard to this special class, if the chattels are severable without material injury to the realty and the conditional sale is filed, the rights of the vendor are superior to those of the mortgagee, whether the chattels are installed before or after the making of the mortgage.¹¹¹ The same rule applies to purchase-money chattel mortgages.¹¹² If the real property mortgage is first recorded, however, the after-acquired property clause attaches to the chattels as a first lien unless the chattel mortgage is a purchase-money mortgage.¹¹³ The priority of the condi-

109. Cf. text at p. 332, *supra*.

110. *Madfes v. Beverly Development Corp.*, 251 N. Y. 12, 166 N. E. 787 (1929); *Kelvinator Sales Corp. v. Byro Realty Corp.*, 136 Misc. 720, 241 N. Y. Supp. 632, *aff'd*, 233 App. Div. 653 (1st Dep't 1931); *Whitney & Co. v. Brown*, 253 App. Div. 180 (3rd Dep't 1938); *Orbon Stove Company v. Schroeder*, 241 App. Div. 832 (2d Dep't 1934).

111. *Harvard Financial Corp. v. Greenblatt Construction Co.*, 261 N. Y. 169, 184 N. E. 748 (elevator); *Lightolier Company v. Del Mar Club Holding Co.*, 237 App. Div. 432, 262 N. Y. Supp. 32 (1st Dep't 1933), *aff'd*, 263 N. Y. 588, 189 N. E. 711 (1933) (electrical fixtures); *Washington Mortgage Corp. v. Forways Realty Corp.*, 235 App. Div. 642, 255 N. Y. Supp. 110 (2d Dep't 1932) (pipe organ); *Prisco & Soverio Inc. v. Bifulco Bros., Inc.*, 234 App. Div. 122, 254 N. Y. Supp. 459 (2d Dep't 1931) (kitchen cabinets); *Hobart Holding Co. v. Fortwell Realty Co.*, 232 App. Div. 689, 264 N. Y. Supp. 744 (2d Dep't 1931) (refrigerators); *Perfect Lighting Fixtures Inc. v. Grubar Realty Corp.*, 228 App. Div. 141, 239 N. Y. Supp. 286 (1st Dep't 1930) (electrical fixtures); *Rosenthal v. 269 W. 72nd St. Corp.*, 148 Misc. 854, 855, 264 N. Y. Supp. 744 (Sup. Ct. 1933) (refrigerators, *dictum*); *Prudence Bonds Corp. v. 1000 Thousand Island House Co.*, 141 Misc. 39, 252 N. Y. Supp. 60 (Sup. Ct. 1930) (sprinkler system; vendor entitled to remove without restoration of building but responsible for any negligent injury to freehold). See also cases cited in Notes (1921) 13 A. L. R. 448, 460; (1931) 73 L. R. A. 748, 755; (1934) 88 L. R. A. 1318, 1324. In *Washington Trust Co. v. Morse I. W. & D. D. Co.*, 187 N. Y. 307, 79 N. E. 1022 (1907), the rights of a conditional vendor of a pumping plant were held superior to a prior mortgagee but the question of recordation did not arise.

112. Cf. *Metropolitan Concert Company v. Sperry*, 9 N. Y. S. Rep. 342, *aff'd*, 120 N. Y. 620, 23 N. E. 1152 (1890).

113. *Matter of Downtown Athletic Club*, 18 F. Supp. 712, (S. D. N. Y. 1936); *Shelton Holding Corporation v. 150 E. 48th St. Corp.*, 264 N. Y. 339, 191 N. E. 8 (1934); *Herold v. Cohrone Boat Co.*, 249 App. Div. 318; 292 N. Y. Supp. 81 (2d Dep't 1936); *Rosenthal v. 269 W. 72nd St. Corp.*, 148 Misc. 854, 264 N. Y. Supp. 744 (Sup. Ct. 1933). The real property mortgagee, likewise, prevails over a subsequent assignee of the mortgagor. *Grant v. Atlantic Assets, Inc.*, 163 Misc. 728, 298 N. Y. Supp. 215 (City Ct. 1937).

The reason for distinguishing between an ordinary chattel mortgage and a *purchase money* chattel mortgage is based upon the nature of a purchase money mortgage. Theoretically, the interest of a purchase money mortgagee is a continuation of his interest as vendor. The vendee, and persons claiming through the vendee, take only subject to such interest. *Dusenbury v. Hulbert*, 59 N. Y. 541 (1875); *Boies v. Benham*, 127 N. Y. 620, 28 N. E. 657 (1891); *Shilowitz v. Wadler*, 237 App. Div. 330, 261 N. Y. Supp. 351 (3d Dep't 1932);

tional vendor or chattel mortgagee, affected by compliance with the filing statutes, may be nullified by the "three-corner priority puzzle."¹¹⁴

If the conditional sale is not filed, it is, nevertheless, good as between the parties thereto,¹¹⁵ and unless Personal Property Law, Section 65 or 67 applies, the reservation of title is good as against third persons.¹¹⁶

Duer v. Kent Realty Co., 113 Misc. 743, 186 N. Y. Supp. 584 (Sup. Ct. 1920). Therefore, when a real property mortgagor buys personal property and gives a chattel mortgage in part payment therefor, the chattel mortgagee claims under a right created prior to the time when the lien of the real property mortgagee's after-acquired property clause could attach.

114. In *Chasnov v. Marlane Holding Co.*, 137 Misc. 332, 244 N. Y. Supp. 455 (Sup. Ct. 1930), and *G. Goldberg & Sons v. Gilet Building Corp.*, 135 Misc. 158, 237 N. Y. Supp. 258 (Sup. Ct. 1929), the mortgaged premises were subject to building loan and subordinate mortgages, both containing after-acquired personal property clauses. Subsequent to the recordation of the mortgages, conditional vendors sold and installed refrigerators and other chattels. After installation the building loan mortgagees made additional advances in accordance with the terms of their building loan agreements. Thereafter, the conditional sales were filed. The junior mortgagees foreclosed and, subsequently, were sued by the vendors for conversion. The building loan mortgagees were deemed purchasers by virtue of advances made subsequent to installation without knowledge of the retention of title. The junior mortgagees, though not deemed purchasers, and therefore subordinate to the conditional vendors, were held to have good defenses to claims for conversion on the ground that they could not commit waste against the prior building loan mortgagees either by removing the chattels themselves or permitting third persons to accomplish the same. Somewhat similar situations were before the court in *McCloskey v. Henderson*, 231 N. Y. 130, 131 N. E. 865 (1921), and *Shelton Holding Corp. v. 150 E. 48th St. Corp.*, 264 N. Y. 339, 191 N. E. 8 (1934).

115. The common law rule that an unfiled conditional sale was good as between the parties [*Creamery Package Manufacturing Co. v. Horton*, 178 App. Div. 467, 165 N. Y. Supp. 257 (3d Dep't 1917); *Kommel v. Herb-Gner Construction Co.*, 228 App. Div. 96, 239 N. Y. Supp. 148 (1st Dep't 1930), *rev'd* on other grounds, 256 N. Y. 333, 176 N. E. 413 (1931)] is unchanged by N. Y. PERS. PROP. LAW (1931) § 67. *M. P. Moller Co. v. Irving Trust Co.*, 59 F. (2d) 1001, 1003 (C. C. A. 2d, 1932); (1928) 37 YALE L. J. 505, n. 79.

116. A prior mortgagee is not a "purchaser" of subsequently installed goods. *Icahn v. Kestlinger*, 231 App. Div. 841, 246 N. Y. Supp. 829 (2d Dep't 1930); *In re Tonawanda Brewing Corp.*, 13 F. Supp. 345 (W. D. N. Y. 1936) (brewing vats and tanks). Neither is a purchaser at a foreclosure sale of a prior mortgage. *Craine Silo Co., Inc. v. Alden State Bank*, 218 App. Div. 263, 218 N. Y. Supp. 143 (4th Dep't 1926) (silo). In *India Wharf Holding Corp. v. 60 Hamilton Avenue Corp.*, N. Y. L. J. Oct. 11, 1934 p. 1219, col. 6 (Sup. Ct.) a sprinkler system which, by stipulation at the trial was agreed to be removable, had been installed under an unfiled conditional sales contract. A junior mortgagee, after such installation, had advanced money in payment of interest on the senior mortgage. Such advances were held to be in protection of the junior mortgage, giving the holder a right of subrogation but not making him a "purchaser" of the sprinkler system, despite the presence of an after-acquired personal property clause in the junior mortgage.

A trustee in bankruptcy of a conditional vendee is not a "purchaser" and derives no advantage from a failure to file. *M. P. Moller Co. v. Irving Trust Co.*, 59 F. (2d) 1001, (C. C. A. 2d, 1932) (pipe organ); *In re Albanese*, 44 F. (2d) 602 (N. D. N. Y. 1930) (theatre seats attached to concrete floor by expanding screws).

Where the mortgagee is a "purchaser", the reservation of title is invalid as to him;¹¹⁷ but this problem is less apt to arise in the case of chattel

Where building loan mortgages covered future goods "attached to or used in connection with" the premises, advances made thereunder after delivery of goods intended to be, but not at the time of the advances, affixed to the premises, the mortgagee was held not to be a "purchaser" of the unaffixed articles. *Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932) (lighting fixtures); *McCloskey v. Henderson*, 231 N. Y. 130, 131 N. E. 865 (1921) (materials for heating plant). In both these cases the mortgagee was held to be a purchaser of similar articles installed at the time of the advance. These cases do not exclude unattached goods from the scope of the usual personal property clause but expressly hold that goods intended to be affixed are not covered by the mortgage until after fixation.

Where the articles are gas ranges and refrigerators, and subject only to N. Y. PERS. PROP. LAW (1938) § 65, a subsequent mortgagee [*Madfes v. Beverly Development Co.*, 251 N. Y. 12, 166 N. E. 787 (1929); *Central Union Gas Company v. Browning*, 210 N. Y. 10, 103 N. E. 822 (1913)], or vendee of the realty [*Kelvinator Sales Corporation v. Byro Realty Co.*, 136 Misc. 720, 241 N. Y. Supp. 632, *aff'd*, 233 App. Div. 653, 249 N. Y. Supp. 910 (1st Dep't 1931)], is not a "purchaser" by virtue of the mortgage or deed. The mortgages in these cases did not expressly purport to cover personally and the deed included only "appurtenances." But *cf. Mechanics and Traders Bank v. Bergen Heights Realty Corp.*, 137 App. Div. 45, 122 N. Y. Supp. 33 (2d Dep't 1910). Reservation of title to a refrigerating plant twining through a building, sold to a tenant, is void as to the non-assenting owner, and a purchaser at a foreclosure sale of a prior mortgage acquires title to the plant. *Voss v. Melrose Bond & Mortgage Corp.*, 160 Misc. 30, 288 N. Y. Supp. 576 (Mun. Ct. 1936). The same was held true of plumbing installed under a conditional sale on behalf of a tenant. *LeVine v. Rosenthal*, 252 App. Div. 803, 293 N. Y. Supp. 887 (3d Dep't 1937). But a mortgagee is not "the owner of the realty" within the last sentence of N. Y. PERS. PROP. LAW (1931) § 67. *Harvard Financial Corp. v. Greenblatt Construction Co.*, 261 N. Y. 169, 184 N. E. 748 (1933).

117. In *Kohler Co. v. Brasun*, 249 N. Y. 224, 164 N. E. 31 (1928), a vendee in possession of realty had a lighting and power plant installed under an unfiled conditional sale. The plant was deemed "a part of the realty" but removable. The purchaser at a foreclosure sale of the land contract prevailed over the conditional vendor. Either the second or third sentence of N. Y. PERS. PROP. LAW (1931) § 67, is applicable.

The conditional vendor who fails to file is cut off by a subsequent mortgage covering personal property [*Cohen v. 1165 Fulton Ave. Corp.*, 251 N. Y. 24, 166 N. E. 792 (1929) (gas ranges); *Kommel v. Herb-Gner Construction Co.*, 256 N. Y. 333, 176 N. E. 413 (1931) (electric lighting fixtures); *In re Tonawanda Brewing Corp.*, 13 F. Supp. 345 (W. D. N. Y. 1936) (brewing vats and tanks)]; or by advances, made subsequent to installation, under a building loan mortgage containing a personal property clause [*Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932) (lighting fixtures); *McCloskey v. Henderson*, 231 N. Y. 130, 131 N. E. 865 (1921) (heating plant); *Lloyds First Mortgage Corporation v. Lombardo*, 227 App. Div. 400, 237 N. Y. Supp. 456 (2d Dep't 1929) (gas ranges). *Contra: New York Title & Mortgage Co. v. Mapark Holding Corporation*, 236 App. Div. 219, 258 N. Y. Supp. 378 (1st Dep't 1932)]; or by payments made by a property owner to a conditional vendee-builder who is obligated under his contract to install personal property [*Alf Holding Corporation v. American Stove Company*, 253 N. Y. 450, 171 N. E. 703 (1930); and see *Curry v. Geier Construction Co., Inc.*, 225 App. Div. 498, 234 N. Y. Supp. 59 (2d Dep't 1929)]. But the burden of establishing one's self as a mortgagee in good faith, or a purchaser for value without notice, is upon the person seeking to take advantage of the failure to file. *Murphy v. Luverne Realty*

mortgages for the reason that unless a chattel mortgage in New York is promptly filed, or accompanied by delivery of possession, it is "absolutely void" against general creditors of the mortgagor whose claims arose prior to filing.¹¹⁸ A conditional vendor of articles attached to the realty acquires no lien, *per se*, against the realty¹¹⁹ although the installation may be such as to be the basis of a mechanics' lien¹²⁰ against the "owner" of the realty as that term is defined in the Lien Law.¹²¹

Where the articles involved are acquired, subsequent to the mortgage, in replacement of others which had been installed when the mortgage was made, the lower courts are in conflict.¹²² The rights of a conditional vendor of a heating plant, who had filed, were postponed to a mortgagee,¹²³ on the ground that the removal of the old plant impaired the mortgagee's security. It was said that the vendor must prove that the old equipment was of no value or that the new plant remained personalty. This was distinguished subsequently, in one refrigerator case,¹²⁴ on the ground that the rule was inapplicable to personalty, but was followed in

Corp., 235 App. Div. 874, 257 N. Y. Supp. 694 (2d Dep't 1932); *Craine Silo Company v. Alden State Bank*, 218 App. Div. 263, 218 N. Y. Supp. 143 (4th Dep't 1926) and see cases collected in *New York Title & Mortgage Co. v. Grossman Properties, Inc.*, 142 Misc. 274, 276, 253 N. Y. Supp. 533 (1931), *aff'd*, 236 App. Div. 665, 257 N. Y. Supp. 1031 (1st Dep't 1932). A prior mortgagee is not a *bona fide* purchaser for value by reason of subsequent extension agreement. *Greater New York Development Company v. Ka-Ro Building Corporation*, 256 N. Y. 657, 177 N. E. 181 (1931).

118. N. Y. LIEN LAW (1937) § 230, as construed. *Baker v. Hull*, 250 N. Y. 484, 489, 166 N. E. 175, 178 (1929); *In re Meyers*, 24 F. (2d) 349 (C. C. A. 2d, 1928); *Matter of Pellegrim*, 248 App. Div. 526, 528, 290 N. Y. Supp. 774 (2d Dep't 1936); *Matter of Shay*, 157 Misc. 615, 285 N. Y. Supp. 379 (Surr. Ct. 1935). An unfiled chattel mortgage is good, however, between the parties. *Gandy v. Collins*, 214 N. Y. 293, 108 N. E. 415 (1915) and as against the personal representatives of the mortgagor unless the estate is insolvent, whereupon the representatives represent creditors. See Note (1934) 91 A. L. R. 299.

119. *In re Master Knitting Corp.*, 7 F. (2d) 11 (C. C. A. 2d, 1925); *N. Y. El. Co. v. Petmaland Realty Corp.*, 243 N. Y. 477, 154 N. E. 530 (1926).

120. See (1927) YALE L. J. 713. But the filing of a mechanics lien by a conditional vendor constitutes such an election as to bar the right to repossess under the conditional sale. *H. & P. Finance Corp. v. Friedman*, 264 N. Y. 285, 190 N. E. 641 (1934); *Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17, *aff'd*, 193 N. Y. 622, 86 N. E. 1126 (1908).

121. N. Y. LIEN LAW (1916) § 2.

122. Cf. note 46, *supra* (first paragraph).

123. *Roche v. Thurber*, 246 App. Div. 850, 285 N. Y. Supp. 82 (1936), *aff'd*, 272 N. Y. 582, 4 N. E. (2d) 814 (1936).

124. *Newbrook Realty Co., Inc. v. Frigidaire Sales Corporation*, N. Y. L. J., Oct. 6, 1936, p. 1026, col. 6 (City Ct.). Cf. *Davis v. Bliss*, 187 N. Y. 77, 83, 79 N. E. 851, 854 (1907).

three other cases.¹²⁵ The same conflict occurs in cases outside of New York.¹²⁶

Conclusions

The mortgagee's attorney cannot advise his client with complete assurance that the ordinary real estate mortgage covers unattached personalty. He has no warrant for advising that such articles as gas ranges and mechanical refrigerators¹²⁷ are fixtures, and much less for unattached objects. Practically, he will conclude that in many of the situations presented the after-acquired personal property clause is of little assistance. True enough, its presence will make the mortgagee a "purchaser" even of gas ranges and refrigerators, installed at the inception of the mortgage, and thereby cut off secret equities. But the articles in issue have frequently been installed since the inception of the mortgage and represent replacements, due to wear and tear, or, in a progressive community, the modernization of older structures. These may, in an urban apartment hotel, for example, represent a huge sum. The question is, in probably a majority of the cases, presented when the mortgage is in default, and it is at this stage that judgments and other liens against the mortgagor are apt to appear. Besides this, the likelihood of mesne conveyances or the use of a dummy obligor on the mortgage, individual or corporate, and followed by a conveyance to the real party in interest, makes it unlikely that the owner of the equity is the mortgagor or a person affirmatively bound by the after-acquired property clause. Herein lies the weakness of the clause.

The theory that an after-acquired property clause is an affirmative covenant, not running with the land, represents an exaltation of doctrine which has no application to this situation. It is based upon a fiction that a mortgagor agrees, as soon as the property is *in esse*, to give a mortgage thereon. In fact, he almost never does give such mortgage except, possibly, in response to a covenant for further assurances. Future property, acquired by the mortgagor and within the scope of the covenant, is held to feed the mortgage *eo instanti*, without a new mortgage and *without any affirmative act* on the mortgagor's part.¹²⁸ The fiction, therefore, is

125. *Nicklas v. Pickford*, 160 Misc. 257, 289 N. Y. Supp. 1058 (Sup. Ct. 1936); *Kinman v. Nyrealty Co.*, 167 Misc. 534, 3 N. Y. S. (2d) 948 (Sup. Ct. 1938); *Keston Holding Corp. v. Review Palace Corp.*, N. Y. L. J. Jan. 8, 1938, p. 114, col. 7 (Sup. Ct.).

126. (1921) 13 A. L. R. 468; (1931) 73 A. L. R. 762.

127. But a central frigidaire system is deemed part of the realty. *Frigidaire Sales Corporation v. Syracuse Investing Corp.*, 239 App. Div. 880, 265 N. Y. Supp. 566 (1st Dep't 1933).

128. See *McCaffrey v. Woodin*, 65 N. Y. 459, 466 (1875); *Guaranty Trust Co. v. N. Y. & Q. C. Ry. Co.*, 253 N. Y. 190, 209, 170 N. E. 887, 894 (1930); *President, etc., Manhattan Company v. Ellda Corporation*, 245 App. Div. 625, 628-629, 283 N. Y. Supp. 827, 829 (1st Dep't 1935).

one not intended to be relied upon, and there would seem to be slight warrant for characterizing this procedure as the discharge of an affirmative obligation. The purchaser of the realty is charged with knowledge of a recorded mortgage and its terms.¹²⁹ Despite the general rule in New York against the running of affirmative covenants, covenants to build fences along boundary lines, to repair party walls, to provide railroad crossings, to pay rent, and to repair leased buildings have been held to run.¹³⁰ Furthermore, the Court of Appeals recently re-examined the "ancient rules and precedents" governing the running of covenants, determined these to be criteria voluntarily applied by the courts, and found them no bar to the running of a covenant to pay an annual sum for the maintenance of roads, parks, sewers and beach of a real estate development.¹³¹ Making the future property clause bind articles a sub-

129. *Cambridge Valley Bank v. Delano*, 48 N. Y. 326, 336 (1872); *Anderson v. Blood*, 152 N. Y. 285, 46 N. E. 493 (1897); *Fidelity & Deposit Co. v. Queens Guaranty Trust Co.*, 226 N. Y. 225, 123 N. E. 370 (1919).

130. See *Miller v. Clary*, 210 N. Y. 127, 134, 103 N. E. 1114, 1118 (1913).

131. *Neponsit Property Owner's Ass'n, Inc. v. Emigrant Industrial Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938).

The ancient rules and precedents, dating from *Spencer's Case* (5 Coke 16) prescribed that the parties must intend the covenant to run, that it must "touch" or "concern" the land and that there be "privity of estate" between the person seeking to enforce the covenant and the person whose compliance is sought. The rule also required the use of the word "assigns" where the subject matter of the covenant was not *in esse* when the covenant was made. The terms "touch" and "concern" have defied precise definition [CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* (1929) 76; (1938) 47 *YALE L. J.* 821, 823], and "are not part of a statutory definition" [*Neponsit*, *supra*, at 255, 15 N. E. (2d) at 795]. The word "assigns" should be unnecessary in our question because N. Y. *REAL PROP. LAW* (1909) § 257 reads into the statutory form of mortgage a clause stating that assigns of the mortgagor are bound with the same effect as if such assigns were named.

The policy against the running of affirmative covenants is said to be for the purpose of lessening burdensome encumbrances on titles. See CLARK, *supra*, at 113; (1936) 13 *N. Y. U. L. QUART. REV.* 313, 314. But many burdensome covenants are enforced. A right of way, for example, may perpetually burden one man's land with an easement in favor of another, so that the former can never build upon the spot or do any act which may interfere with the right of way. *Burbank v. Pillsbury*, 48 N. H. 475, 477, 97 *Am. Dec.* 633 (1869). Mortgage covenants, it should be noted, are not perpetuities. Furthermore, it has been maintained that the running of affirmative covenants and equitable servitudes will enhance land's alienability. See (1938) 47 *YALE L. J.* 821, 826.

Under the English rule affirmative covenants generally do not run. It has been said that, outside of New York, the overwhelming weight of American authority is to the contrary [*Murphy v. Kerr*, 5 F. (2d) 908, 911 (C. C. A. 8th, 1925); 3 *POMEROY, EQ. JURIS.* (4th ed. 1918) § 1295; (1934) 19 *CORN. L. Q.* 145, 146] and that affirmative and negative covenants run with equal facility [(1936) 13 *N. Y. U. L. QUART. REV.* 313, 314]. But an examination of the American decisions in the last decade indicates that affirmative covenants in exactly one half of the cases were made to run, and concludes that the American rule is confused and chaotic. (1938) 47 *YALE L. J.* 821. In *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913) the court not only pointed out that some affirmative covenants run in New York, *i.e.*, to build fences along boundary lines, repair party walls,

sequent owner acquires, would, it is submitted, be no more "affirmative" than his liability *in rem* to pay interest and taxes. Inasmuch as the after-acquired property clause concededly creates an equitable mortgage upon the goods as soon as they come into being, the rule that lien and attaching creditors prevail over the mortgagee with respect to after-acquired property is an illogical limitation upon the general rule that equitable mortgages are enforceable against the mortgagor, attaching or levying creditors and all subsequent takers with notice.¹³² This exception has not escaped criticism.¹³³ The situation is not comparable to that of the all-inclusive corporate trust indenture,¹³⁴ the construction of which has been held to "justify a limited displacement of contract and recorded liens on behalf of temporary and unsecured creditors."¹³⁵

There is no reason why replacements and additions, made to preserve both the equity and mortgage security from waste, and obsolescence should not enure to the benefit of the mortgage lien. Neither is there any reason, other than the traditional notion of fixtures, to prevent all articles installed in mortgaged property, by the mortgagor or any owner

provide railroad crossings, pay rent and repair leased buildings, but expressly left the way open for further exceptions. Prior to the Neponsit case, the American cases were criticized generally for being based upon an uncritical acceptance and an inconsistent use of ancient theories and metaphysical doctrine. It was suggested that the intention of the parties be emphasized as a guiding test together with a use of judicial discretion to decide that covenants should run. (1938) 47 YALE L. J. 821. This approach was used by the court in the Neponsit case, *supra*, which referred to the ancient rules as "words used by courts in England in old cases to describe a limitation which the courts themselves created or to formulate a test which the courts have devised and which the courts voluntarily apply." 278 N. Y. at 255, 15 N. E. (2d) at 795. Though the court paid lip service to the requirements of Spencer's Case, *supra*, it read a new content into them. In construing the requirement of "touching" and "concerning" the court distinguished covenants that run from personal covenants by "a classification based upon substance rather than form" and by looking to "the effect of the covenant on the legal rights which otherwise would flow from the ownership of the land and which are connected with the land." The corporate plaintiff owned no land in the development and the defendant argued that there was no privity of estate. Nevertheless, the court found that the plaintiff was acting as agent or representative of the property owners and, without ignoring the corporate form, concluded that "the ancient formula . . . should not be applied to this case. In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant." 278 N. Y. at 262, 15 N. E. (2d) at 798.

132. See Stone, *The Equitable Mortgage in New York* (1920) 20 COL. L. REV. 519, 523.

133. *Id.* at 527.

134. Cf. *State Bank v. Lamoka Power Corporation*, 269 N. Y. 1, 198 N. E. 609 (1935); *New York Security Co. v. Saratoga G. & El. Co.*, 159 N. Y. 137, 53 N. E. 758 (1899). "The mortgage was not one of the sort dealt with in *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127 (1907)." *In re Downtown Athletic Club*, 18 F. Supp. 712, 716. (S. D. N. Y. 1936).

135. See *Kossoff v. Wald*, 245 App. Div. 646, 656, 284 N. Y. Supp. 130, 136 (1st Dep't 1935).

of the premises and whether attached or not, of such nature as are ordinarily supplied by a landlord, from going with the realty. Rights of conditional vendors and chattel mortgagees are adequately protected at present, and would not be impaired, in such cases where their priority is now recognized, if the mortgage lien were limited to the owner's equity in such articles. Real estate financing through trustees and lending institutions subject to similar investment limitations would be facilitated if a proposed mortgagee could be assured that, in the event of a foreclosure, he would obtain the real property in an immediately rentable condition.¹³⁶

It is hardly likely, in view of the attitude of the Court of Appeals in the *Madfes* case, that the scope of fixtures will be extensively broadened by judicial legislation. The *Peck-Schwartz* case places in doubt the status of unattached personalty under existing mortgages and lays down technical requirements for future mortgages that will beset the general practitioner no end. There is no reason, however, why the effect of the after-acquired property clause cannot be expanded by statute to fulfill its literal promise.

This could be accomplished by amending Section 231 of the Lien Law to read, insofar as is pertinent here, as follows:

"Mortgages creating a lien upon real and personal property, including after-acquired property, executed as security for the payment of a bond or bonds . . . need not be filed or refiled as chattel mortgages."

136. If this is not true, the mortgagee must immediately upon foreclosure make an additional investment, possibly in a substantial amount, before the property becomes income-bearing. A trustee does not discharge his obligations in the making of mortgage loans by compliance with the statutory requirements for legal investments; and such compliance is no protection against surcharge for consequent loss if he fails to act prudently. *Matter of Flint*, 240 App. Div. 217, 269 N. Y. Supp. 470 (2d Dep't 1934), *aff'd*, 266 N. Y. 607, 195 N. E. 221 (1935). *Matter of Young*, 249 App. Div. 495, 293 N. Y. Supp. 97 (1937), *aff'd*, 274 N. Y. 543, 10 N. E. (2d) 541 (1937). Trustees, making loans within the statutory ratio of value, have been surcharged on the ground of inadequate income at the time of the making of the mortgage [*Matter of Dalsimer*, 160 Misc. 906, 291 N. Y. Supp. 34, *aff'd*, 251 App. Div. 385, 296 N. Y. Supp. 209 (1st Dep't 1937); *Matter of Frank*, 160 Misc. 903, 291 N. Y. Supp. 44 (Surr. Ct. 1936); *Matter of Poillon*, 163 Misc. 897, 902, 298 N. Y. Supp. 220, 222 (Surr. Ct. 1937)], although no statutory provision lays down such a requirement and loans on inherent land value alone have long been considered both safe and conservative. In fact, loans on entirely unimproved property are expressly provided for though at a smaller value-ratio. N. Y. BANKING LAW (1938) § 239(6.). If a mortgagee must make a substantial advance upon foreclosure, query, whether in view of the foregoing a fiduciary, obligated by statute to invest only on unincumbered property, may invest in such mortgages. The prospective necessity of advances by a mortgagee upon foreclosure has been held to be one of the elements properly cognizable when valuing mortgages for the purpose of filing claims against mortgage guaranty companies. *Matter of New York Title & Mortgage Co.*, 277 N. Y. 66, 80, 13 N. E. (2d) 41, 50 (1938).

and by amending Section 254 of the Real Property Law, so far as is here pertinent to read as follows:

"In mortgages of real property . . . the following or similar clauses and covenants must be construed as follows, 'the mortgagor hereby mortgages to the mortgagee (description)' must be construed as equivalent in meaning to the words, 'the said party of the first part . . . doth hereby grant and release unto the said party of the second part, and to his heirs (or successors) and assigns forever (description), together with all the appurtenances, and all the estate and rights of the party of the first part in and to said premises, together with all fixtures and articles of personal property now or hereafter attached to, or used in connection with, the premises; including, without limitation upon the generality of the foregoing, so much of such fixtures and articles of personal property, whether or not affixed or attached to said premises and whether installed by the mortgagor or any other owner of said premises, as are customarily placed in or upon similar premises by an owner thereof. . . . This provision shall bind and enure to the benefit of the parties thereto and their heirs, successors or assigns. . . ."